Supreme Court, U.S.
FILED
941995 JUN 5 - 1995
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE,

Petitioner,

—v.—

FREEHOLD COGENERATION ASSOCIATES, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THEODORE C. GRANGER,
DEPUTY PUBLIC ADVOCATE
DIVISION OF THE RATEPAYER ADVOCATE
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
(201) 648-2690

June 5, 1995

27pp

QUESTIONS PRESENTED

These questions involve the interpretation of the Public Utility Regulatory Policy Act of 1978 ("PURPA") (Pub. L. 95-617, 92 Stat. 461), rules prescribed thereunder by the Federal Energy Regulatory Commission ("FERC") (18 C.F.R. § 290.101, *et seq.*), and the implementation of those rules by the New Jersey Board of Public Utilities ("Board").* The FERC rules govern, *inter alia*, long-term purchases of electricity by public utilities at a price fixed at the beginning of the term ("power purchase agreement") from certain cogeneration projects, called qualifying facilities ("QFs," See 16 U.S.C. § 796(16)(C)). The FERC rules set the purchase price at the avoided cost (16 U.S.C. § 824a-3(d)), which is the cost to the utility of alternative sources of electricity calculated at the time that the purchase agreement becomes legally binding and enforceable (hereafter referred to as "the relevant PURPA/FERC purchase price" or "the relevant PURPA/FERC ceiling" or "the relevant current avoided cost"). The relevant PURPA/FERC ceiling protects the utility's ratepayers from subsidizing cogeneration, when a cheaper alternative source of electricity is available. With this terminology, the questions presented for review are:

1. Are the utility's ratepayers entitled, under PURPA, to have the state regulatory commission exclude from rates a power purchase agreement set at a price exceeding the relevant PURPA/FERC ceiling?

2. Is the federal judiciary prohibited, under PURPA, from exercising jurisdiction over a state regulatory commission proceeding, the purpose of which is to exclude from rates the cost of a power purchase agreement set at a price exceeding the relevant PURPA/FERC ceiling?

---

* During the period relevant to this case, the state legislature changed the Board's name from the Board of Public Utilities to the Board of Regulatory Commissioners in 1990, and back again to the Board of Public Utilities in 1994.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the U.S. Court of Appeals for the Third Circuit ("Third Circuit") appear in the caption of the decision of the Third Circuit except for the New Jersey Division of the Ratepayer Advocate, which was an intervenor in the proceedings before the District Court and an appellee in the proceedings before the Third Circuit.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 8

1. Under PURPA, Ratepayers Have a Right to Have the State Regulatory Commission Implement the PURPA/FERC Prohibition Against the Subsidization of Cogenerators by Disallowance of Recovery of Long-Term Utility Purchases of QF Electricity at a Price Exceeding the Relevant PURPA/FERC Prescribed Level Applicable at the Time the Purchase Agreement Became Effective 8

PAGE

2. PURPA Prohibits the Courts of the United States from Exercising Jurisdiction over State Regulatory Commission Proceedings Initiated to Exclude from Rates Paid by Ratepayers the Recovery of a Long Term Purchase of QF Electricity at a Price Exceeding the Relevant PURPA/FERC Ceiling Applicable at the Time the Purchase Agreement Became Effective..... 14

3. The Third Circuit Decision Exercised Jurisdiction over a State Regulatory Commission's Proceeding to Conform Recovery of a Power Purchase to the Statutory Limit Prescribed by Congress and FERC. This Is in Conflict with the Jurisdictional Prohibition of PURPA and This Court's Decision in *FERC v. Mississippi*. The Third Circuit's Decision Not to Consider the Ratepayer Advocate's Argument on Jurisdiction Is Also in Conflict with This Court's Decisions 16

4. The Third Circuit Decision Held That a State Regulatory Commission May Not Implement the Relevant PURPA/FERC Ceiling Price in Connection with the Purchase of QF Electricity. This Holding Is in Conflict with the Decision of This Court in *American Paper Inst.* and the Decisions of Several State Supreme Courts . 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases:

PAGE

American Paper Inst. v. Amer. Elec. Pow. Serv. Corp, 461 U.S. 402 (1983).....9, 10, 11, 18

Duff v. Trenton Beverage Co., 4 N.J. 595, 607, 73 A.2d 578 (1950) 11

Federal Energy Regulatory Com'n v. Mississippi, 456 U. S. 742 (1982) 12, 13, 15, 16, 17

Kansas City Power & Light v. State Corp. Com'n, 234 Kan., 1052, 676 P.2d 764, 766 (Kan. 1984) 18

Maguire v. Van Meter, 121 N.J.L. 150, 152, 152 A.2d 445 (E.and A. 1938) 11

Miske v. Habay, 1 N.J. 368, 374, 63 A.2d 883 (1949). 11

Miss. And Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878) 18

Norman v. Baltimore & O. R., Co., 294 U. S. 240 (1934) 12

State of North Carolina ex rel. Utilities Commission v. North Carolina Power, 338 N.C. 412, 450 S.E.2d 896 (N.C. 1994) 18

Statutes:

16 U.S.C. § 824a-3(a), PURPA § 210(a).....2, 7, 8, 14

16 U.S.C. § 824a-3(b), PURPA § 210(b).....2, 3, 8, 9

16 U.S.C. § 824a-3(d), PURPA § 210(d)..... i, 2

16 U.S.C. § 824a-3(e), PURPA § 210(e)..... 2, 14

16 U.S.C. § 824a-3(f), PURPA § 210(f).....2, 12, 13, 14, 15

PAGE

16 U.S.C. § 824a-3(g), PURPA § 210(g)....2, 6, 7, 14, 16, 17

Regulations:

18 C.F.R. § 292.301(b) 2, 3, 11

18 C.F.R. § 292.303(a) 2, 3, 14

18 C.F.R. § 292.304(a) 2, 8, 13

18 C.F.R. § 292.304(d) 2, 9, 14

18 C.F.R. § 292.602(c) 2, 15, 16

Miscellaneous:

H.R.Conf. Rep. No. 95-1750, 98 (1978), U.S. Code Cong. & Admin. News 1978, 7659 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. _____

THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE,

Petitioner,

—v.—

FREEHOLD COGENERATION ASSOCIATES, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, The New Jersey Division of the Ratepayer Advocate ("The Ratepayer Advocate")[1], respectfully requests that the Court issue a writ of certiorari to review the judgment of the the Third Circuit entered on January 9, 1995.

OPINIONS BELOW

The Ratepayer Advocate hereby adopts the appendix, and pagination (A-1, *et seq.*) of the Petition for Writ of Certiorari

[1] This designation includes the predecessor agency, the Division of Rate Counsel.

of Jersey Central Power and Light Company ("JCP&L") in connection with the same judgment of the Third Circuit.

The opinion of the United States District Court for the District of New Jersey ("the District Court") is not reported. (A-30). The opinion of the Third Circuit, issued January 9, 1995, is reported at 44 F.3d 1141. (A-1). The order of the Third Circuit, entered March 7, 1995, denying a petition for rehearing and suggestion for rehearing in banc, is not reported. (A-29).

JURISDICTION

The judgment of the Third Circuit sought to be reviewed was entered January 9, 1995.

The Third Circuit denied a timely petition for rehearing and suggestion for rehearing in banc, filed January 23, 1995, by an order entered March 7, 1995.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

16 U.S.C. §§ 824-3(a), (b), (d), (e), (f), and (g); respectively, PURPA, §§ 210(a), (b), (d), (e), (f), and g. (See A-39 to A-48).

FERC Regulations, 18 C.F.R. §§ 292.301(b), 292.303(a), 292.304(a) and (d), 292.602(c). (See A-48 and A-49, except for the first and second citation).

18 C.F.R. § 292.301(b) provides

> *Negotiated rates or terms.* Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

18 C.F.R. § 292.302(a) provides

Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

STATEMENT OF CASE

Under the Interstate Commerce Clause of the Constitution of the United States, the United States Congress adopted PURPA for, among other reasons, the encouragement of cogeneration. That encouragement was not without limitation—PURPA incorporated a protection for ratepayers against having to *subsidize* the development of cogeneration. (See the discussion of the first point of the reasons for granting the writ, *infra*). According to PURPA, utilities are to purchase electricity from QFs under rules prescribed by FERC. However, Congress specifically prohibited offers to purchase electricity from QFs at a purchase price exceeding the relevant PURPA/FERC purchase price, which equalled the relevant current avoided cost to the utility of alternative electricity. (16 U.S.C. § 824a-3(b)).

The appeal before the Third Circuit concerned a power purchase contract between Freehold Cogeneration Associates, L.P. ("Freehold") and JCP&L. According to the uncontroverted evidence in the record of the Third Circuit Court, the Board required a purchase price for the electricity supplied by Freehold at a level prohibited by Congress under PURPA, *viz.*, a level above the avoided cost to the utility of alternative

electricity sources at the time the power purchase agreement became effective. Because the Board required a purchase price in excess of the avoided cost to the utility, the power purchase agreement is void pursuant to PURPA which was enacted by Congress exercizing its powers under the Interstate Commerce Clause.

Furthermore, any purported administrative approval of such an agreement, by FERC or the Board, is contrary to the express language of PURPA, which is the statute from which each agency derives its powers in this field. Thus, such an "approval" is null as *ultra vires*.

In addition, by its own terms, ¶ 20.1, the agreement was not to become effective and binding upon the parties until, *inter alia*, the Board had entered a final order approving: (1) the agreement as executed by the parties; and (2) the recovery in rates of all costs to be paid Freehold under the agreement. (Joint Appellate Appendix, ("J.A."), 98). Under New Jersey law, which *according to the terms of the agreement itself*, ¶ 28.1 of the Agreement (J.A. 104), governs the agreement, the Board's *ultra vires* order of approval was void. Moreover, a contract conditioned upon an *ultra vires* approval of the price term is void *ab initio*. (See citations contained in the discussion of the first point under the reasons for granting the writ, *infra*).

The questions presented for review raise two general issues. The first general issue deals with what constitutes state implementation of the FERC rules on the pricing and purchase of QF electricity. The second related general issue has to do with the limits on the federal judiciary to review the state's efforts to implement those FERC rules. The resolution of these issues will allocate the respective responsibilities between the state and federal governments and will determine how the forthcoming increase in competition in the electrical power industry will play itself out. Will ratepayers be able to protect their rights at the state level?

By enacting PURPA Congress created a general scheme with roles for FERC and the pre-existing state regulatory institutions. FERC was required to adopt rules following the broad statutory guidelines specified in PURPA and the states were required to implement the FERC rules for each of the regulated utilities.

To simplify the statement of the case, the Ratepayer Advocate will adopt the statement of facts stated in the opinion of the Third Circuit (A-2 to A-5) with the change in emphasis and the modifications described below.

In 1989, the Board "grandfathered" the proposed Freehold cogeneration project, under an earlier regulation which implemented FERC rules. It ordered JCP&L and Freehold to negotiate a power purchase agreement, whereby JCP&L would purchase Freehold's electricity at a price set at JCP&L's 1989 avoided cost. The extensive negotiations between JCP&L and Freehold took three years to produce the agreement. The Board approved the agreement which was executed on March 26, 1992, at its agenda meeting of June 9, 1992. In the order approving the agreement (J.A. 116) the Board found that the agreement was consistent with the Board's earlier grandfathering order and that the agreement was "fair and reasonable." Also in the order, the Board found the rates specified in the agreement to be "reasonable" and "reasonably and prudently incurred" and undertook to allow JCP&L to recover the price and costs of the agreement through JCP&L's electric rates even though the purchase price exceeded JCP&L's current 1992 Board-approved avoided cost by a substantial amount—contrary to PURPA and the FERC rules on purchase price.

On January 5, 1994, after JCP&L at the request of the Board identified the Freehold project as one of the uneconomic projects which had not yet begun construction, the Board directed the parties to renegotiate the purchase price or, otherwise, negotiate an appropriate buy-out. The Board indicated that if the negotiations failed, it would be prepared to hold evidentiary hearings to review the possible actions it

could take. The negotiations indeed failed and JCP&L requested the evidentiary hearings. On February 17, 1994, the Ratepayer Advocate requested hearings to address the extent to which the costs associated with the power purchase agreement could legally be recovered from JCP&L's ratepayers. (J.A. 577). The Board granted the requests for hearings. The evidentiary hearings uncovered evidence, which was marked for identification by Freehold as Exhibit FCA-18 on May 11, 1994, (hereafter, "FCA-18") that the power purchase price had been set substantially higher than the relevant Board-approved PURPA/FERC ceiling.[2] The disparity amounted to $665 million over the 20-year life of the power purchase agreement. Ratepayers, in other words, were being asked to subsidize Freehold by paying $665 million more than the Board-approved PURPA/FERC ceiling over the life of the agreement.

Meanwhile, to foreclose further Board action in the proceeding, Freehold initiated the present action in the District Court for declaratory judgment on the ground that the Board was preempted by PURPA from holding hearings. After motion and cross motions for summary judgment, the District Court, considering only the question of jurisdiction, held that it did not have jurisdiction over the subject matter by virtue of, *inter alia*, PURPA § 210(g), 16 U.S.C. § 824a-3(g). This section prohibits the federal courts from exercising jurisdiction over the review of any state commission proceeding for the purpose of implementing requirements of FERC's rules on the purchase of QF-supplied electricity. The District Court did not address the parties' arguments which were based on doctrines of abstention or on the substantive law.

On appeal, the Third Circuit did not limit itself to the jurisdictional question addressed by the District Court, but rather, having found that the federal courts had jurisdiction, addressed the issues on the merits and overturned the decision

---

[2] FCA-18 is at AA-8 and AA-9 of the Supplemental Appendix of the Ratepayer Advocate, dated September 6, 1994, in the record of the Third Circuit, below.

of the District Court. It held that, once the Board purported to approve the power purchase agreement, found it "just and reasonable" and consistent with avoided costs, the purchase had to be reflected in rates and the Board could not revisit those decisions. (See the discussion of the fourth point of the reasons for granting the writ, *infra*, where the opinion is quoted). The proceedings before the Board came to a halt. The Third Circuit, however, had refused to consider the jurisdictional argument presented by the Ratepayer Advocate on the ground that the argument was presented for the first time on appeal. This ground, in the view of the Ratepayer Advocate, is contrary to the decisions of the United States Supreme Court concerning raising the issue of subject-matter jurisdiction at any stage of appeal.

The Ratepayer Advocate's argument on jurisdiction was based on FCA-18, which had been uncontroverted in the Board proceeding, and which was made part of the record by the Third Circuit on motion of the Ratepayer Advocate without objection. FCA-18 was marked on May 11, 1994, for identification by Freehold in the Board proceedings, now halted by the Third Circuit, after briefs had been submitted to the District Court. Before this Board proceeding, the Ratepayer Advocate had not been aware of the existence of the document. JCP&L had provided FCA-18 to the Board Staff on June 1, 1992, just before the Board was to consider its approval of the contract at its agenda meeting of June 9, 1992. The document presented data that showed the amount by which the power purchase price in the agreement far exceeded the relevant Board-approved PURPA/FERC ceiling—by approximately $665 million over the life of the power purchase agreement. In the view of the Ratepayer Advocate, PURPA § 210(g)(1), 16 U.S.C. § 824a-3(g)(1), should have barred the Third Circuit from asserting jurisdiction, because the Board was in the midst of attempting to implement, pursuant to PURPA § 210(a), 16 U.S.C. § 824a-3(a), the FERC pricing rules prohibiting the power purchase of QF electricity at prices exceeding the PURPA/FERC ceiling.

REASONS FOR GRANTING THE WRIT

1. Under PURPA, Ratepayers Have a Right to Have the State Regulatory Commission Implement the PURPA/FERC Prohibition Against the Subsidization of Cogenerators by Disallowance of Recovery of Long-Term Utility Purchases of QF Electricity at a Price Exceeding the Relevant PURPA/FERC Prescribed Level Applicable at the Time the Purchase Agreement Became Effective.

PURPA § 210(a), 16 U.S.C. § 824a-3(a), requires FERC to prescribe rules which require electric utilities to offer to purchase electric energy from QFs. PURPA § 210(b), 16 U.S.C. § 824a-3(b), states that the rules which FERC must prescribe for the purchase of electricity from qualifying cogeneration facilities by utilities:

> shall insure that . . . the rates for such purchase—
>
> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators. . . .
>
> No such rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy. (Emphasis added)

(See, also, FERC's rules paralleling the statute (18 C.F.R. § 292.304(a)). The last sentence of this section of the statute precludes the prescription of a rule which allows any state regulatory commission to set the price of a purchase of QF-generated electricity exceeding the incremental cost. Thus, on the face of the statute the incremental cost ceiling for the purchase of QF-generated electricity is absolute. (FERC replaced the phrase, "incremental cost," of PURPA with the phrase, "avoided cost," in the rules it prescribed). PURPA does not

empower FERC or any implementing state regulatory commission with any discretion whatsoever to stray from this prohibition. Also, the pricing limitation does not require any individual or agency to take any action to have that prohibition enforced.

For long term contracts, such as the Freehold/JCP&L power purchase agreement, the pricing rule prescribed by FERC, 18 C.F.R. § 292.304(d)(2)(ii), requires that the price be based upon "the avoided costs calculated at the time the obligation is incurred." (Underlining added). This Court approved the FERC rules which set the purchase price at the statutory limit:

> At this early stage in the implementation of PURPA, it was reasonable for the Commission to prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production. (Underscoring added).

American Paper Inst. v. Amer. Elec. Pow. Serv. Corp, 461 U.S. 402, 417, 103 S.Ct. 1921, 1930, 76 L.Ed. 2d 22 (1983). This decision, being the second decision of this Court on PURPA and a decision which has guided state courts since 1983, has also given every potentially affected proposed QF notice that the highest purchase price at which a utility may be required to offer to purchase QF-electricity is at the avoided cost to the utility of alternative sources of electricity. Avoided cost is "the maximum rate authorized by Congress" because Congress explicity prohibited a price exceeding "avoided cost" in PURPA. (See PURPA § 210(b), 16 U.S.C. § 824a-3(b), quoted *supra.*). Since that time, due diligence for the financing of a proposed QF should have included a review of the legality of the purchase price *vis a vis* the PURPA/FERC price ceiling. Moreover, a utility should not be able to negotiate away the ratepayers' statutory right.

In *American Paper Inst., supra,* this Court explained the relationship between the "just and reasonable" requirement and the avoided cost limitation:

> Unless the "just and reasonable" language is to be regarded as mere surplusage, it must be interpreted to mandate consideration of rate savings for consumers that could be produced by setting the rate at a level *lower* than the statutory ceiling. (Underscoring and italics added).

American Paper Inst., supra, footnote 9, U.S., at 415, S.Ct., at 1929. As the Court stated, a power purchase price cannot be "just and reasonable" with respect to consumers unless that purchase price is less than or equal to the PURPA/FERC current avoided cost. A state regulatory commission cannot, under the color of a finding that the purchase price exceeding avoided cost is "just and reasonable," include such a price in the rates charged the ratepayers. A finding that a power purchase price greater than the relevant PURPA/FERC price is "just and reasonable" is inconsistent with PURPA and thus *per se* unlawful. The action of a state regulatory commission approving such a purchase is void.

Furthermore, an important part of the Conference Report on PURPA reveals that the Congressional purpose for imposing the avoided cost ceiling in PURPA § 210(b) was for the benefit of ratepayers—to protect the ratepayers of the utility from having to subsidize cogenerators:

> . . . The provisions of this section are not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers.

H.R. Conf. Rep. No. 95-1750, 98 (1978), U.S. Code Cong. & Admin. News 1978, 7659, at 7832. The Conference Report represents the final statement of terms agreed to by both Houses of Congress, and next to the statute itself, is the most persuasive evidence of congressional intent. Sutherland, *Statutory Construction*, § 48.08 (5th Edition). Any implementation of PURPA requiring a utility to offer to purchase QF electricity at a price greater than the PURPA/FERC ceiling is a subsidization of the cogenerator by the ratepayer because the ratepayer must pay more for cogeneration elec-

tricity than he would have had to pay if the utility had not been required to offer to purchase the QF electricity.

To summarize, PURPA requires, first, that the purchase price for QF electricity be just and reasonable to the consumer. Second, it forbids a price exceeding the relevant PURPA/FERC price. Third, these requirements are intended to benefit ratepayers. Therefore, the ratepayers are entitled to exclude from rates costs of any power purchase which is not just and reasonable and which exceeds the relevant PURPA/FERC price. This Court made clear the interdependence between "just and reasonable" and "avoided cost" in *Amer. Paper Inst., supra*; that the *maximum* allowable price is the full current avoided cost and that a "just and reasonable" price could not, by definition, be greater than the statutory limit under PURPA. Any purported approval by a state commission of a power purchase at a price greater than the relevant current avoided cost as just and reasonable is *per se* unlawful and void under PURPA. *A fortiori*, any purported approval of such a purchase as "just and reasonable" and as satisfying the avoided cost limitation, when in fact the purchase price exceeds the PURPA/FERC avoided cost limitation, is *per se* unlawful and void. Such an "approval" is not an implementation, but a *frustration* of the FERC rules governing the purchase price.

In parallel fashion, the application of the law of the State of New Jersey produces the same result; *viz.*, that Board "approval" of the power purchase agreement was *ultra vires* and void and the power purchase agreement was void *ab initio*. The agreement specifies that New Jersey law governs the contract. (J.A. 104). (This is permitted under the rules of FERC: 18 C.F.R. § 292.301(b)). See, *e.g.*, *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 607, 73 A.2d 578 (1950), *Maguire v. Van Meter*, 121 N.J.L. 150, 152, 152 A.2d 445 (E.and A. 1938), and *Miske v. Habay*, 1 N.J. 368, 374, 63 A.2d 883 (1949).

This Court upheld PURPA as a valid exercise of the powers of Congress under the Commerce Clause of the United States

Constitution. *Federal Energy Regulatory Com'n v. Mississippi,* 456 U. S. 742, 759, 102 S.Ct. 2126, 2137, 72 L. Ed. 2d 532 (1982). Inherent in the Commerce Clause, the plenary exercise of these powers reaches and attaches *directly* to the contracts incorporating such a proscribed purchase—no matter that there may have been intervening state assent or approval—and these contracts are rendered void.

> . . . Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. [Citations omitted].
>
> This principle has familiar illustration in the exercise of the power to regulate commerce. If shippers and carriers stipulate for specified rates, although the rates may be lawful when the contracts are made, if Congress through the Interstate Commerce Commission exercises its authority and prescribes different rates, the latter control and *override* inconsistent stipulations in contracts previously made. This is so, even if the contract be a charter granted by a state and limiting rates, or a contract between municipalities and carriers. [Citations omitted]. (Underscoring and italics added).

Norman v. Baltimore & O. R. Co., 294 U.S. 240, 307 and 308, 55 S.Ct.407, 416 (1934).

In *FERC v. Mississippi, supra,* U.S. at 750, S.Ct. at 2132, this Court described the duties and obligations of the state regulatory commissions under PURPA § 210(f)(1), 16 U.S.C. § 824a-3(f)(1):

> In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity cus-

> tomarily engaged in by the Mississippi Public Service Commission.
>
> . . . . . .
>
> . . . The Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirement simply by opening its doors to claimants. That the Commission has administrative as well as judicial duties is of no significance. [Footnote omitted]. Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation [Citation omitted] and the congressional determination that the federal rights granted by PURPA can appropriately be enforced *through state adjudicatory machinery.* (Underscoring and italics added).

U.S., at 760 and 761, S.Ct. at 2137 and 2138.

The PURPA and FERC requirements to insure that the purchase price be "just and reasonable" and not to exceed the relevant PURPA/FERC ceiling are rules. (18 C.F.R. § 292.304(a)). The state regulatory commissions, in particular the Board, are obliged under PURPA § 210(f)(1), 16 U.S.C. § 824a-3(f)(1), to implement these rules. When a contract between a utility and a QF specifies a purchase price greater than the current avoided cost of the utility, the Board is under Congressional mandate to carry into effect the PURPA/FERC rules prohibiting such pricing *on behalf of ratepayers* as Congress intended. (See the Conference Report (quoted, *supra*) on Congressional intent).

2. PURPA Prohibits the Courts of the United States from Exercising Jurisdiction over State Regulatory Commission Proceedings Initiated to Exclude from Rates Paid by Ratepayers the Recovery of a Long Term Purchase of QF Electricity at a Price Exceeding the Relevant PURPA/FERC Ceiling Applicable at the Time the Purchase Agreement Became Effective.

Under PURPA § 210(f)(1), 16 U.S.C. § 824a-3(f)(1), each state regulatory commission must implement the rules prescribed by FERC under PURPA § 210(a), 16 U.S.C. § 824a-3(a). The FERC rules governing the utility's offer to purchase QF electricity, including the PURPA and FERC avoided cost ceiling on the purchase price, are such rules. PURPA § 210(e)(3)(A), 16 U.S.C. § 824a-3(e)(3)(A), prohibits exempting any QF from any state law or regulation in effect pursuant to PURPA § 210(f), 16 U.S.C. § 824a-3(f).

A critical provision for this case is PURPA § 210(g)(1) which prohibits any court of the United States from exercising jurisdiction over any action to review proceedings conducted by state regulatory commissions for the purpose of implementing any requirement of a rule under PURPA § 210(a), *i.e.*, implementation proceedings. PURPA § 210(g)(1) provides that judicial review of such state proceedings may be obtained in an appropriate state court pursuant to applicable state procedures. Thus, only a state court has jurisdiction over the review of an implementation proceeding.

The state regulatory commission proceedings under discussion give effect to FERC rules 18 C.F.R. § 292.303(a) and 18 C.F.R. § 292.304(d)(1). Rule 18 C.F.R. § 292.303(a) requires electric utilities to purchase electricity from QFs and rule 18 C.F.R. § 292.304(d)(1) sets the purchase price for long-term, fixed-price purchases as the avoided cost calculated at the time the obligation is incurred. The approval of a purchase price that exceeds the relevant PURPA/FERC price—the relevant current avoided costs at the time the obligation becomes enforceable—obviously *does not implement the rule*, but

rather *thwarts and contravenes it*. On the other hand, PURPA § 210(f)(1), 16 U.S.C. § 824(a)-3(f)(1), commands the state regulatory commission to implement the rule and thus to conform the purchase to these rules. Implementation under this section of PURPA requires notice and an opportunity for public hearing, *i.e.*, implementation requires a proceeding before the state regulatory commission. Thus, this kind of proceeding is merely an implementation proceeding, which triggers the section of PURPA that removes the jurisdiction of the courts of the United States.

The Third Circuit used FERC rule 18 C.F.R. § 202.602(c) to justify enjoining a state implementation proceeding. (A-6). Therefore, it is reasonable to give some consideration to this theory of federal court intervention. The regulation says in pertinent part:

> (1) Any [QF] shall be exempted . . . from State law or regulation respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities.

It is inconceivable that Congress would have intended that this part of PURPA could be used to allow the federal judiciary to undermine the clear Congressional scheme of PURPA; that the FERC rules provide the substantive rules and that the state regulatory machinery, including the state court procedure for review, be the primary governmental means of carrying the substantive rules into effect and resolving disputes related to the implementation of the substantive rules. (See *FERC v. Mississippi, supra,* recognizing that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery). It is self-evident that, though Congress may have meant to preclude continuous scrutiny of rates of the sort to which utilities are subjected, it most certainly did not mean to preclude state regulatory commissions from implementing FERC rules prescribed pursuant to PURPA.

It was error for the Third Circuit to determine that a state proceeding with the purpose of conforming a power purchase to the relevant PURPA/FERC rules on the pricing of the purchase is preempted under 18 C.F.R. § 292.602(c)(1). This is entirely inconsistent with PURPA and undermines the grand design of Congress for PURPA. Suppose that any such aggrieved party to a state implementation proceeding could commence an action on the federal level on the ground that the manner of the state's implementation is utility-type regulation preempted by PURPA. (And, in fact, Freehold did exactly this when it determined that the Board matter, which it had initiated for approval of proposed changes to the power purchase agreement, was not proceeding as it had hoped). Then the federal court would assert jurisdiction, as the Third Circuit did, on the ground that preemption under 18 C.F.R. § 292.602(c)(1) is a PURPA right, distinct from implementation, with respect to which the federal court can assert jurisdiction, without the restraints on its jurisdiction over state implementation proceedings. That would tend to undermine the Congressional design to use "the state adjudicatory machinery" to implement, and review implementation of, FERC rules. See *FERC v. Mississippi*, *supra*.

3. The Third Circuit Decision Exercised Jurisdiction over a State Regulatory Commission's Proceeding to Conform Recovery of a Power Purchase to the Statutory Limit Prescribed by Congress and FERC. This Is in Conflict with the Jurisdictional Prohibition of PURPA and This Court's Decision in *FERC v. Mississippi*. The Third Circuit's Decision Not to Consider the Ratepayer Advocate's Argument on Jurisdiction Is Also in Conflict with This Court's Decisions.

Because PURPA § 210(g)(1), 16 U.S.C. § 824a-3(g)(1), forbids the federal courts from exercising jurisdiction over actions arising from a proceeding of a state regulatory commission implementing the rules prescribed by FERC under PURPA, a federal court's jurisdiction over Board proceedings depends upon whether the proceeding is one implementing

FERC rules. There is no avoiding that a federal court—to determine its jurisdiction—must preliminarily determine the nature of the Board proceedings to determine whether the proceedings are a means of implementation of FERC rules. If the purpose of the proceedings is to implement, the court has no discretion, it does not have jurisdiction. The Ratepayer Advocate argued that the purpose of the Board proceeding was to implement PURPA's and FERC's rules prohibiting power purchase prices above the "just and reasonable" level or above the relevant PURPA/FERC ceiling. The Third Circuit was at least obliged to consider the argument, but it did not. (See footnote 3 of the decision. (A-4). According to *FERC v. Mississippi*, *supra*, the Board appropriately initiated and held these hearings in order to carry into effect the relevant FERC rules governing this power purchase.

Under PURPA § 210(g)(1), 16 U.S.C. § 824a-3(g)(1), Congress stated that no court of the United States shall have jurisdiction over actions in connection with a proceeding of a state regulatory commission implementing the rules prescribed by FERC for the purchase, and pricing of the purchase, of QF electricity under PURPA. Under this section of PURPA, it was incumbent upon the Third Circuit to review the record before it, including FCA-18, to determine whether there was an obstacle to the exercise of jurisdiction over this matter. Not only did the Third Circuit not give consideration to this uncontested evidence, the Court did not even acknowledge its existence.

More important, however, is that the Third Circuit's decision is in serious conflict with the fundamental law of this Court:

> Objections to the jurisdiction of the court below when they go to the subject-matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court.

Miss. And Rum River Boom Co. v. Patterson, 98 U.S. 403, 406, 25 L.Ed 206, 207 (1878). This principle should hold, *a fortiori*, because the uncontroverted evidence, FCA-18, which surfaced in the Board proceeding below, was part of the record before the Third Circuit and cited by the Ratepayer Advocate. As a consequence, the Third Circuit should have refrained from exercising jurisdiction and should have held that the District Court properly dismissed Freehold's complaint for want of subject-matter jurisdiction. (See the discussion of the second point under the reasons for granting the writ, *supra*).

4. The Third Circuit Decision Held That a State Regulatory Commission May Not Implement the Relevant PURPA/FERC Ceiling Price in Connection with the Purchase of QF Electricity. This Holding Is in Conflict with the Decision of This Court in *American Paper Inst.* and the Decisions of Several State Supreme Courts.

American Paper Inst., supra, held that the maximum price for the purchase of QF electricity was the relevant statutory limit and that a "just and reasonable" price could not as a matter of law exceed that statutory limit. That decision has served as a guide to several state Supreme Courts. See, *e.g.*, *Kansas City Power & Light v. State Corp. Com'n*, 234 Kan., 1052, 676 P.2d 764, 766 (Kan. 1984) and *State of North Carolina ex rel. Utilities Commission v. North Carolina Power*; 338 N.C. 412, 450 S.E.2d 896 (N.C. 1994). The Third Circuit had before it uncontroverted evidence (FCA-18) of a substantial disparity between the price in the power purchase agreement and the relevant Board-approved PURPA/FERC ceiling. In the grandfathering decision and the decision approving the Freehold/JCP&L power purchase agreement, the Board had specifically required JCP&L to offer to purchase Freehold's electricity at this unlawful price. The aforementioned document (FCA-18) had been sent by telecopier to the Board on the eve of the Board's "approval" of the agreement. The Third Circuit ignored this evidence and held that

once the Board "approved" the contract and found the purchase price to be "just and reasonable" and consistent with the relevant PURPA/FERC price, the Board could not reconsider the approval or deny the inclusion of the power purchase in rates to JCP&L's customers:

> . . . Finally, we hold that once the BRC [Board] approved the power purchase agreement between Freehold and JCP&L on the ground that the rates were consistent with avoided cost, just, reasonable, and prudentially incurred, any action or order by the BRC to reconsider its approval or to deny the passage of those rates to JCP&L's consumers under purported stated authority was preempted by federal law.

(A-28).

The Third Circuit did not give any reason for binding the ratepayers to what was a *per se* unlawful price. It ignored the claim that the Board's approval and the agreement were *per se* unlawful. If the Third Circuit had not done so, it would, of necessity, have been required to refrain from exercising jurisdiction over the Board proceeding. (See the discussion in the first point in the reasons for granting the writ, *supra*). The immediate upshot of the Third Circuit's decision is a compounded violation of PURPA—it ratifies a Board proceeding which did not implement FERC rules and bars a Board proceeding intended to implement those rules.

Congress made explicit its intention that under PURPA the ratepayers were not to subsidize cogenerators. It further commanded that the FERC rules should *insure* that the purchase price was "just and reasonable". This Court held that "just and reasonable" could not exceed the statutory limit—the avoided cost to the utility of alternative sources of power at the time that the agreement becomes legally enforceable. (See the discussion in the first point under the reasons for granting the writ, *supra*, for statement of Congressional intent that the prohibitions are intended for the benefit of ratepayers). By looking away from compelling evidence of illegality in the

pricing of the power purchase agreement and forbidding the Board from "revisiting" these issues, the Third Circuit *insured* that the ratepayers of JCP&L would subsidize Freehold and *insured* that the rates were *per se* unreasonable and unjust, and, therefore, *per se* unlawful. Concisely, the Third Circuit's decision ratified a power purchase which accomplished precisely the opposite of what Congress had intended to accomplish by legislating PURPA, and aborted a proceeding to carry into effect that Congressional purpose. The Third Circuit's decision, if not reversed, will also perpetuate the compound contravention of Congressional design into the future by embedding the grossly overpriced cost of the Freehold/JCP&L power purchase agreement in the rates paid by JCP&L's ratepayers.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on the two questions presented.

Respectfully submitted,

THEODORE C. GRANGER
DEPUTY PUBLIC ADVOCATE
DIVISION OF THE RATEPAYER ADVOCATE
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
(201) 648-2690

June 5, 1995